THE HON'BLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION NO.21684 OF 2006

Between :

B.Yellaswamy son of B.Kumariah

… Petitioner

And

The South Central Railway, rep.by its General Manager, Secunderabad and others

… Respondents

THE HON'BLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION *NO.*21684 OF 2006

ORAL ORDER:

The petitioner assails the order of the 2nd respondent bearing reference No.C/C/37/cloakroom/SC/05, dated. 25-08-2006 whereby invoking the clause.50 of the "General conditions for running the cloak room contract at Secunderabad Railway Station" (for short "general conditions"). The contract purportedly awarded to the petitioner was terminated forfeiting an amount of Rs.20,94,221/- from the amounts paid by the petitioner. The break up of the amount of Rs.20,94,221/- thus forfeited includes the difference of licence fee (Rs.3,36,152/-); difference of ground rent (Rs.750/-); cost of advertisement (Rs.48,328/-); loss of man hours (Rs.8,790/-); and security deposit (Rs.17,00,201/-).

The Railways issued a tender notification dated.18-06-2005 inviting offers/bids for grant of lease of the cloakroom in

the Secunderabad Railway Station for the three-year period from 13-12-2005 to 12-12-2008. Pursuant to the notification, the petitioner submitted his bid. By a communication dated.17-10-2005 the 2nd respondent informed the petitioner that pursuant to his tender application dated.14-07-2005, it has been decided to award the cloakroom contract at Secunderabad Railway Station to the petitioner by an annual licence fee of Rs.17,00,201/- subject to payment of the stipulated amounts and submitting a bank guarantee towards a security deposit valid for a period of 39 months, for Rs.17,00,201/-. The period within which the several payments should be made has also been stipulated and the petitioner is informed by the letter (dated.17-10-2005) that the stipulated amounts should be paid so as to enable necessary action being taken to enter into an agreement with the railway administration. By another communication dated.06-12-2005 the petitioner was informed that as he had remitted half of the licence fee, ground rent and security deposit (by a bank guarantee) an authorisation letter permitting the petitioner to run the cloakroom at Secunderabad, from the midnight of 12-12-2005 is being forwarded and that a copy of the agreement is also enclosed for execution. The letter was to constitute an authority for the petitioner for undertaking the work till an agreement is executed.

One Smt.P.Vani filed a writ petition No.26098 of 2005 assailing the award of the lease to the petitioner. This Court by the order dated.07-12-2005 observed that any proceedings taken for finalisation of the tender including the execution of any agreement in favour of the petitioner herein would be subject to further orders on the writ petition.

Pursuant to the letters dated.17-10-2005 and 06-12-2005, of the 2nd respondent, the petitioner ought to have been

put in possession of the cloakroom at Secunderabd Railway Station for pursuing his contractual entitlements, if those proceedings of the 2nd respondent constituted the formal agreement which formed the basis of the lease in his favour. The petitioner submitted a representation on 14-12-2005 and 27-01-2006 requesting delivery of possession of the cloakroom to enable him to execute the contract. However on 08-02-2006 the 2nd respondent informed the petitioner that further course of action would be taken only after the writ petition No.26098 of 2005 (filed by Smt.P.Vani) is finalized.

The petitioner submitted a further representation on 23-03-2006 and 12-04-2006 to the 2nd respondent requesting either to deliver possession of the cloakroom or refund the earnest money deposit and bank guarantee and the other amounts paid pursuant to the authorisation letter dated.17-10-2005. In response thereto, the 2nd respondent by his letter dated.19-04-2006 informed the petitioner that further action would be taken only after the disposal of Writ Petition No.26098 of 2005. The petitioner was also advised to endure the situation till the finalisation of the case.

On 25-08-2006 the 2nd respondent issued the impugned order terminating the “contract awarded” duly forfeiting Rs.20,94,221/-, under clause 50 of the general conditions of the contract.

It requires to be noticed that there was no agreement entered into between the parties as has been mentioned in the 2nd respondent’s letter dated.06-12-2005. On the petitioner’s application pursuant to the tender notification dated.18-06-2005, he was issued a tender form. Each of the bidders was presumably issued a similar form. Clause.5 of the tender form

reads "*I/We enclose the solvency certificate for Rs.10 lakhs, Experience Certificate and Credentials*". According to the learned Standing Counsel for the Railways what is intended by clause.5 is the disqualification of any person convicted of any offence. The language of clause.5 is not indicative of this intention nor does it signal the incorporation of any such disqualification. A grammatical interpretation of the phraseology of the clause.5 does not *per se* posit any such term or condition of disqualification. Along with tender form have been communicated the general conditions for running the cloakroom contract at the Secunderabad Railway Station. Clause.46 of the general conditions, a clause on which much reliance is placed by the railways, reads thus: " *If the licensee fails to fulfil the terms and conditions of this agreement, the administration shall have the right to terminate the licence immediately and determine this agreement and in that event the whole or any of the amounts paid by him together with the security deposit shall be forfeited and the licensee shall not have claim for compensation occasioned thereby and also be liable for consequential loss/inconvenience if any arising out of such default*". The clause (clause 50) on which reliance is placed to terminate the contract awarded to the petitioner, in the 2nd respondent's proceeding dated.15-08-2006, reads thus: " In the event of insolvency or conviction by a Criminal Court of the licensee, this contract shall automatically cease".

As is apparent from the somewhat unusual procedure adopted by the respondent-railways the authority for the petitioner to perform his part of the obligations under the lease (in respect of the cloakroom at Secunderabad Railway Station) is the authorisation letter dated.06-12-2005 which states that acceptance of the terms of the letter dated 06-12-2005 would

constitute "*a binding for undertaking this work until an agreement is executed*".

Dehors, the inappropriate language, perhaps intendment of this phrase in the letter dated.06-12-2005 is that it constitutes an authority for performance of the reciprocal obligations by the parties, pending the execution of a formal agreement. It is the admitted factual scenario that no formal agreement has been entered into between the parties as has been assumed *qua* the 2nd respondent's letter dated.06-12-2005. Be that as it may. The mere fact that the petitioner signed the tender form and the general conditions for running a cloakroom contract at Secudnerabad Railway Station (a bunch of papers appended to the tender form), would not entitle the respondent to forfeit the amounts deposited by him. Conviction of a person is not shown to have been stipulated as a disqualification for bidding or participating in the tender pursuant to the tender notification dated. 18-06-2005. On terms, clause.50 of the general conditions only stipulates that conviction will result in the automatic cessation of the contract.. This is the quite different from conviction being a threshold disqualification for participation. May be such disqualification should logically follow, but that is a matter for stipulation.

The Railways is a big and established public authority and an instrumentality of the State, with vast resources and long years of experience in the award of public contracts. It has available a battery of legal consultants to advise it in the matter of drafting the conditions of its contracts. If the Railways desire that conviction for any or specified offences should constitute a threshold disqualification for participating in any of its contracts, the Railways ought to have stipulated such a disqualification in the tender notification or should have inserted a clear clause

requiring the intending bidder to stipulate/specify whether he was ever involved in a criminal case or was convicted of any offence. There is no document brought to the notice of this Court, which requires the bidders, including the petitioner to specify whether they were convicted of any offence. The vague clause.5 of the tender form, which merely requires the bidders to enclose “credentials” does not signify an obligation of the bidders to disclose the factum of their conviction along with the submission of the tender form. In such a factual context it is not possible to conclude that the respondent/Railways had stipulated conviction as a disqualification to participate in the bids.

In the absence of any agreement entered into between the parties which in clear terms (either expressly or by compelling implication) enables forfeiture of the amounts deposited by the petitioner, the respondent-Railways has no authority, power or jurisdiction to impose or enforce a forfeiture. Clause.46 of the general conditions only stipulates that when a licensee fails to fulfil the terms of “this agreement”, the Railway administration is entitled to terminate the license immediately and determine “this agreement” and in such an event the whole or any of the amounts paid by a bidder together with the security deposit shall be forfeited and the licensee shall not be entitled to compensation. No formal agreement has been entered into and as conviction does not constitute a threshold disqualification for participation in the contract, this Court is unable to appreciate the respondents’ stand that they are entitled to forfeit the amount deposited by the petitioner.

Though the writ petition has been filed assailing the termination of the contract by the 2nd respondent’s letter dated.25-08-2006 with a consequential relief sought to the said

respondent to deliver possession of the cloakroom to enable the petitioner to execute the contract, Sri D.Prakash Reddy, the learned Senior Advocate, appearing for the learned counsel for the petitioner would state that the petitioner is no longer interested in pursuing the cloakroom lease, since it was not handed over to him on the jejune ground that writ petition No.26098 of 2005 (filed by Smt P.Vani) was pending.

On the aforesaid analysis and in the circumstances the writ petition is partly allowed. The order of the 2nd respondent bearing reference No.C/C/37/Cloak Room/SC/05, dated.25-08-2006, to the extent it orders the forfeiture of Rs.20,94,221/- from the amount deposited by the petitioner, is set aside. The entire amounts deposited by the petitioner towards the whole or part of the annual licence fee, ground rent, security deposit etc., shall be refunded to the petitioner expeditiously and in any event within a period of thirty (30) days from the date of receipt of a copy of this Order. In the circumstances there shall be no order as to costs.

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GODA RAGHURAM,J

17th JANUARY 2007

***TSNR**